# Lim Teck Kong v Dr Abdul Hamid Abdul Rashid & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B–02–757 OF 1998
MOKHTAR SIDIN, HAIDAR AND ABDUL KADIR SULAIMAN, JCA
28 SEPTEMBER 2005

*Evidence — Expert evidence — Court to assess weight of evidence — Trial judge expressing preference for expert report prepared soon after incident — Whether trial judge had erred*

*Tort — Negligence — Economic loss — Claim for — The modern approach*

*Tort — Negligence — Professional negligence — Engineers — Whether civil and structural engineers negligent for failing to conduct proper soil tests*

The plaintiffs intended to build a bungalow on their land and engaged the services of the first defendant — a civil and structural engineering firm. The first defendant was owned by the fourth defendant — a registered engineer at the material time. The plaintiffs moved into their completed bungalow in 1985. Sometime in 1987, the third defendant began construction works on a plot of land adjoining the plaintiffs' land. In September 1987, the rear portion of the plaintiffs' bungalow collapsed. The plaintiffs suffered losses and damages. The plaintiffs sued, inter alia, the first, third and fourth defendants. In the High Court, two expert reports over the collapse were tendered in evidence. The first report by one Dr Ramli was tendered by the plaintiffs whereas the second report by one Dr Toh was tendered by the fourth defendant. The trial judge preferred the evidence of Dr Ramli and found for the plaintiffs. The trial judge ordered the first, third and fourth defendants pay the plaintiffs RM364,173 in damages. Liability was apportioned 40% against the third defendant and 60% against the fourth defendant. The fourth defendant appealed to the Court of Appeal.

**Held**, dismissing the appeal with costs:

(1) It was clear to the Court of Appeal — having perused the two reports — that the trial judge had come to the right conclusion. The trial judge had taken great pains to study both reports. The trial judge preferred the views of Dr Ramli over Dr Toh since Dr Ramli carried out investigations soon after the collapse whereas Dr Toh carried out investigations six years after the collapse. The trial judge was justified in taking such views (see paras 28).

(2) It was not true to say that the trial judge had rejected the evidence of Dr Toh. The trial judge considered the evidence of both Dr Ramli and Dr Toh but had

preferred the evidence of Dr Ramli since his investigations were closer to the time when the incident took place. Dr Ramli's evidence was also supported by the fourth defendant himself when he admitted that he did not do a thorough testing of the soil where the bungalow was built. This was negligence on the part of the fourth defendant. There was no fault on the part of the trial judge (see para 30).

(3) In the instant case, the losses suffered by the plaintiffs were not pure economic losses. The damages suffered by the plaintiffs were the loss of the bungalow which collapsed a few years after it was built on a site that the first defendant — engaged by the plaintiffs as consultant — failed to conduct thorough tests as to whether it was safe to build on that site. The trial judge correctly concluded that the first defendant was also negligent and liable (see para 36).

**Obiter**:

The legal principle for accepting a claim for economic loss is not only confined to defective buildings and structures. It has a far greater impact on all situations by analogy and if limited by the limitations imposed in *D & F Estates Ltd & Ors v Church Commissioners for England & Ors* [1989] AC 177 and *Murphy v Brentwood District Council* [1990] 2 All ER 908, it would be grossly inequitable and justice would not be served. A claim for pure economic loss can therefore be entertained in a claim for negligence (see para 32). In the instant case, the trial judge was within his right to award damages for pure economic loss (see para 35).

**[Bahasa Malaysia summary**

Plaintif-plaintif berhasrat untuk membina sebuah bungalow di atas tanah mereka dan telah melantik khidmat defendan pertama — firma kejuruteraan sivil dan struktur. Defendan pertama dimiliki oleh defendan keempat — jurutera berdaftar pada masa matan. Plaintif-plaintif telah berpindah ke bungalow siap mereka pada 1985. Sekitar 1987, defendan ketiga telah memulakan kerja-kerja pembinaan atas plot tanah bersempadan tanah plaintif-plaintif. Dalam bulan September 1987, bahagian belakang bungalow plaintif-plaintif runtuh. Plaintif-plaintif telah mengalami kerugian dan kerosakan. Plaintif-plaintif telah menyaman, antara lain, defendan-defendan pertama, ketiga dan keempat. Di Mahkamah Tinggi, dua laporan pakar berhubung keruntuhan itu telah dikemukakan dalam keterangan. Laporan pertama oleh Dr Ramli telah dikemukakan oleh plaintif-plaintif manakala laporan kedua oleh Dr Toh telah dikemukakan oleh defendan keempat. Hakim perbicaraan menyebelahi keterangan Dr Ramli dan memutuskan bagi pihak plaintif-plaintif. Hakim perbicaraan telah memerintahkan defendan-defendan pertama, ketiga dan keempat membayar plaintif-plaintif RM364,173 sebagai ganti rugi. Liabiliti telah dibahagikan 40% kepada defendan ketiga dan 60% kepada defendan keempat. Defendan keempat telah merayu ke Mahkamah Rayuan.

**Diputuskan**, menolak rayuan tersebut dengan kos:

(1) Adalah jelas pada Mahkamah Rayuan — setelah meneliti kedua-dua laporan tersebut — bahawa hakim perbicaraan telah tiba kepada keputusan yang betul. Hakim perbicaraan telah meneliti dengan terperinci kedua-dua laporan.

Hakim perbicaraan lebih yakin dengan pendapat Dr Ramli daripada Dr Toh memandangkan Dr Ramli telah menjalankan siasatan sejurus selepas keruntuhan manakala Dr Toh menjalankan siasatan enam tahun selepas keruntuhan itu. Hakim perbicaraan dijustifikasikan dalam mengambilkira pendapat tersebut (lihat perenggan 28).

(2) Adalah tidak benar untuk mengatakan bahawa hakim perbicaraan telah menolak keterangan Dr Toh. Hakim perbicaraan telah menimbangkan keterangan kedua-dua Dr Ramli dan Dr Toh tetapi lebih yakin dengan keterangan Dr Ramli memandangkan siasatan beliau lebih dekat dengan masa kejadian itu berlaku. Keterangan Dr Ramli juga disokong defendan keempat sendiri apabila beliau mengaku beliau tidak menjalani ujian terperinci terhadap tanah di mana bungalow itu dibina. Kecuaian ini adalah di pihak defendan keempat. Tiada kesilapan di pihak hakim perbicaraan (lihat perenggan 30).

(3) Dalam kes semasa, kerugian yang dialami oleh plaintif-plaintif bukan kerugian ekonomi tulen. Kerugian yang dialami oleh plaintif-plaintif adalah kehilangan bungalow yang telah runtuh beberapa tahun selepas ia dibina atas kawasan itu bahawa defendan pertama — yang telah dilantik oleh plaintif-plaintif sebagai perunding — gagal untuk menjalankan ujian-ujian dengan teliti berhubung sama ada ia adalah selamat untuk membina atas kawasan itu. Hakim perbicaraan adalah betul dalam memutuskan bahawa defendan pertama juga adalah cuai dan bertanggungjawab (lihat perenggan 36).

**Obiter**:

Prinsip undang-undang untuk menerima tuntutan kerugian ekonomi adalah untuk tidak membatas kepada bangunan dan struktur defektif. Ia mempunyai impak yang lebih luas ke atas semua keadaan melalui analogi dan jika batasan itu digunakan dalam *D & F Estates Ltd & Ors v Church Commissioners for England & Ors* [1989] AC 177 dan *Murphy v Brentwood District Council* [1990] 2 All ER 908, ia adalah tidak saksama dan keadilan tidak akan dilaksanakan. Suatu tuntutan untuk kerugian ekonomi boleh dipertikaikan dalam satu tuntutan kecuaian (lihat perenggan 32). Dalam kes semasa, hakim perbicaraan mempunyai hak mengawardkan ganti rugi untuk kerugian ekonomi (lihat perenggan 35).]

**Notes**

For cases on court to assess weight of evidence, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1384–1385.

For cases on economic loss, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 831–842.

For cases on professional negligence, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 945–1013.

**Cases referred to**

*D & F Estates Ltd & Ors v Church Commissioners for England & Ors* [1989] AC 177 (refd)

*Kerajaan Malaysia lwn Cheah Foong Chiew dan lain-lain* [1993] 2 MLJ 439 (refd)

*Murphy v Brentwood District Council* [1990] 2 All ER 908 (refd)

*Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors* [1995] 2 MLJ 663 (refd)

**Legislation referred to**

Local Government Act 1976 s 101(ee)
Uniform Building By-Laws 1984 by-law 8(3), 10, 17, 25(2)

**Appeal from**: Civil Suit No 22–9 of 1990 (High Court, Shah Alam)

*Stanley KW Chang (Ti Lian Bee with him) (Stanley Chang & Associates) for the appellant.*
*N Pathmanathan (Preetha Pillai with her) (Skrine & Co) for the respondents.*

**Mokhtar Sidin JCA (delivering judgment of the court):**

**[1]** Sometime in January 1990, the respondents issued a writ of summons and a statement of claim against the appellant and four others. This writ and statement of claim was amended on 27 December 1990. In the amended writ and the statement of claim, the first defendant was Jurusan Malaysia Consultants (sued as a firm), the second defendant was Majlis Daerah Gombak, the third defendant was Mighty Corporation Sdn Bhd, the fourth defendant is the appellant in the present appeal and the fifth defendant was an individual by the name of Leow Kim Sang. After hearing the case, the High Court, Shah Alam on 15 December 1996 made an order that the first, third and fourth defendants do pay the sum of RM364,173 to be apportioned as follows:

(1) The first defendant and/or fourth defendant to pay the plaintiffs (the respondents in this appeal) the sum of RM218,503.80 representing 60% liability.

(2) The third defendant the sum of RM145,669.20 representing 40% liability.

**[2]** The claim of the respondents as against the second defendant was dismissed with costs. As against the fifth defendant, the learned judge found that he was a clerk in the first defendant's firm, although he represented himself as a partner in the first defendant's firm. No order was made against him.

**[3]** In order to understand the roles played by the parties, we have to refer to the statement of claim and the statements of defence. We will refer to the parties as they were in the High Court. In their amended statement of claim, the plaintiffs claimed that sometime in early 1984, they wanted to build a double-storey bungalow ('the bungalow') on Lot No 3007, Mukim of Ulu Kelang, Gombak, Selangor, belonging to them and the bungalow was intended to be their residential home. The plaintiffs then engaged the services of the first defendant, a firm of civil and structural engineers who was then practicing at 201-A (1st Floor), Jalan Imbi, Kuala Lumpur. The plaintiffs claimed that when they went to the office of the first defendant, the fourth and fifth defendants claimed to be the partners of the first defendant's firm. During the trial, it was established that the fifth defendant was only a clerk and a draughtsman of the firm and not a partner. At the recommendation of the first defendant, the plaintiffs entered into a written agreement (the building contract) with one Yap Foot Ching ('the contractor') to build the bungalow. One of

A the terms and conditions of the building contract was the contractor was to perform the works shown in the drawings and the specifications prepared by or under the direction of the first defendant. It is not disputed that the bungalow was duly completed and the plaintiffs and their family moved into the said building when the contractor handed over vacant possession to the plaintiffs on 11 April 1985.

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**[4]** The claim of the plaintiffs against the second defendant (a corporate body established under the Local Government Act 1976) was that the second defendant being the District Council where the bungalow was situated has legal duties which amongst others include:

C (a) to do or cause to be taken or done such steps or acts so as to prevent matters which are likely to endanger public safety or cause damage to property within the local authority area including and not limited to the proper supervision and examination of proper and safe drainage and flow of water within the area and the removal of any dangers arising therefrom;

D (b) the supervision and approval of, inter alia, building plans in respect of buildings and other structures proposed to be built or erected within local authority area.

**[5]** In or about the middle of 1987, the third defendant commenced construction E works on Lot 3008 which was a lot adjoining Lot 3007 to erect another residential building. During the course of construction on Lot 3008 a meeting was held between the owner of Lot 3008, a representative of the third defendant and the first plaintiff whereby the third defendant was alerted that construction works carried out by the third defendant on Lot 3008 posed a potential danger to the neighbouring lots including Lot 3007 because Lot 3008 stood on higher ground. The third defendant's F representative assured the parties that adequate steps would be taken to prevent obstruction and water collection and ensure free flow and drainage of water passing through the vicinity of Lot 3007.

**[6]** Between the night of 17 September 1988 and the early morning of G 18 September 1988, the rear portion of the bungalow collapsed and as a result the bungalow became uninhabitable. The plaintiffs thus suffered losses, damages and expenses. In the statement of claim the plaintiffs claimed that the damages to the bungalow and Lot 3007 were due to breach of duty by all the defendants either jointly or severally. The damages and losses suffered by the plaintiffs are particularised in the schedules to the statement of claim.

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**[7]** The first, fourth and fifth defendants filed their statement of defence. In the statement of defence, the fourth and fifth defendants admitted they were the partners of the first defendant's firm. (During the trial, evidence was adduced to show that the fifth defendant was not a partner but only a clerk in the firm). They denied that they I were in breach of duty and put the plaintiffs to strict proof. The defendants further

claimed that they had fully discharged their legal and/or contractual duties by adopting the normal engineering practices. They also claimed that in constructing the bungalow they had adopted the following measures:

(a) conducted pre-design assessment and evaluation of the site conditions of Lot 3007;

(b) supported the new buildings on Lot 3007 on a piled foundation based on correct design considerations.

**[8]** This was based on their experience in development of building site and housing infrastructure. The defendants averred that the cause of the collapse was due to the failure to maintain by an ignorant owner of an initially stable slope which was increased by overburden to the slope and erosion.

**[9]** The second defendant in their statement of defence denied that they own any legal duty as averred by the plaintiffs in their re-amended statement of claim. The second defendant further stated in their defence that pursuant to the Local Government Act, the second defendant merely had the power to execute works of such general advantage to the inhabitants of the local authority areas and to do all things necessary or conducive to the public safety, health and convenience. The second defendant also stated that they were not responsible for any alleged loss, damage or expense incurred or suffered by the plaintiffs.

**[10]** The third defendant admitted that they did construction works on Lot 3008, but denied that the construction works caused the damages and losses on Lot 3007 as claimed by the plaintiffs. The third defendant also denied that a meeting between the representative of the third defendant, the first plaintiff and the owner of Lot 3008 ever took place as alleged by the plaintiffs. The third defendant claimed that they had carried out and completed the construction of the building on Lot 3008 in accordance with the contract drawings and specifications and also the directions of the architects and civil and structural engineers employed by the owner of Lot 3008. The third defendant further averred that they had taken all reasonable measures and steps at all material times to avoid dangers and/or causing any damage to the neighbouring lots such as implementing run-off drains and that there were no unfilled trench on Lot 3008 during and after the construction of the building on Lot 3008. The third defendant further claimed that the bungalow's collapse was caused and/or contributed to by the plaintiffs' failure to exercise reasonable care in not engaging a competent consultant civil and structural engineers to prepare, design, drawings and plans and all other necessary works in connection with the building of their family house. Alternatively, the third defendant contended that the collapse of the bungalow was caused by and/or contributed to by the breach of the first defendant.

**[11]** The learned trial judge in his judgment found the following facts as proved either by documents or oral evidence adduced during the trial. Sometime in 1984 or 1985, the first plaintiff went to the first defendant's office. When he was inside the office he was attended to by the fifth defendant who gave an impression that he was also an engineer. The plan for a double-storey house was drawn and signed by the

fourth defendant. It was not disputed that the fourth defendant was a registered engineer with the Board of Engineers at the material time but he was struck off at the time when the trial took place as a result of his admission to the regulatory body that he had breached the rules by operating two firms at the same time, one of which was the first defendant. That was the reason why the fifth defendant (who was only a clerk and a draughtsman) claimed to be an engineer and a partner in the first defendant's firm. The first defendant then prepared the building plans in respect of the bungalow and submitted the plans to the second defendant for approval. The second defendant approved the plans. The contractor approved by the fourth defendant then commenced construction of the bungalow and completed it in 1985 and handed over vacant possession of the bungalow to the plaintiffs.

**[12]** On 18 September 1988, at about 3am, the plaintiffs were awakened by a loud noise. The first plaintiff looked out of his bedroom window and saw the concrete deck and the boundary brick wall which were erected on his land had tilted and collapsed. The plaintiffs and their family then rushed out of the house. At about 5am, the first plaintiff heard shattering sounds of glass coming out from his house. By about 6am, the plaintiffs returned to the house and found that half of the house on the side of the river had collapsed. The incident was reported to the relevant authorities including the second defendant. On the instigation of the second defendant, the plaintiffs appointed Kumarasivam Tan Ariffin Sdn Bhd (KTA), an engineering consultant, to determine the cause of the collapse. A report was issued on 3 April 1989. In that report, it was stated the causes of the collapse were:

(1) the slope on which the said building was built was steep with a gradient of about 45 degrees;

(2) engineers advising on the building and construction of the house took little consideration in assessing the stability of the slope;

(3) an excavation that was carried out on a neighbouring land known as Lot 3008 at the material time by the third defendant who were the contractors engaged in erecting a double-storey bungalow thereon;

(4) heavy rainfall; and

(5) the erosion at the river banks bordering Lot 3007.

**[13]** The learned trial judge found that the fourth defendant was the proprietor of the first defendant. The fifth defendant was only a clerk and a draughtsman working with the first defendant and not the co-proprietor as alleged by the plaintiffs. The learned trial judge then dismissed the plaintiffs' claim against the fifth defendant.

**[14]** The learned judge found that the claim by the plaintiffs against the second defendant is based on negligence and breach of statutory duties. The learned trial judge found that the plaintiffs failed to establish the specific provisions in the statute where the second defendant had breached except may be the following provisions:

(1) Section 101(ee) of the Local Government Act 1976 relates to 'the local authority shall have the power to divert, straighten, define and canalise the course of any stream, channel or watercourse';

(2) Section 53(1) of Act 133 requires local authority to maintain and keep in repair watercourses under the control of the local authority;

(3) Section 70A of Act 133 empowers the local council to order cessation of earth works where the safety of life or property is affected or is likely to be affected;

(4) By-law 8(3) and 17 Uniform Building By-Laws 1984 confer powers on local authority to disapprove building and structural plans submitted for its approval;

(5) By-law 10 Uniform Building By-Laws 1984 sets out requirement for building plans submitted to the local authority must contain complete lines of surface water discharge to the proposed drains, which the plaintiffs claim is absent in the site plans for their lot submitted by the first and/or fourth defendants;

(6) By-law 25(2) Uniform Building By-Laws 1984 requires that 'all … open spaces in and around buildings shall be suitably protected against soil erosion' of the second defendants have failed to ensure relevant steps to protect this.

**[15]** The learned trial judge dismissed the claim against the second defendant on the following grounds:

> Firstly, whether the pleadings of the plaintiffs have sufficiently disclose material facts to support the plaintiffs' claim for breach of statutory duty against the second defendants. In order to succeed under a cause of action for breach of statutory duty the plaintiffs must show that they came within the class of person intended by an Act or regulation to be protected, that the statutory provision was broken, and that they suffered damage and that this damage was caused by the breach of the provision… In essence the entire claim based on breach of statutory duty depends on the provision of the statute or by-laws being alleged to be breached. The affected legal provision has thus become a material fact that needs to be disclosed, for failure to do so the defendant will be caught by surprise and be prejudiced in their defence…
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> Secondly, the Uniform Building By-Law 1984 in which various provisions are said to have been breached did not come into force in the State of Selangor until 1 January 1986. The building plans of the house was submitted around 1984 and the completed house was handed over for possession to the plaintiffs on 11 April 1985. Therefore any allegations for breach of statutory duties which involve the second defendants in respect of this piece of legislation before it came into force cannot be sustained, there being no enacted statute at the material time to be breached. Though the second defendants may have relied on this by-law as a guideline in the course of their duties before the enactment of this statute in the State of Selangor, but in a claim for breach of statutory duty reliance must be on a lawful enactment and not on a piece of legislation that has no force of law in a particular area.
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> Thirdly, by virtue of s 95 of Act 133:
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> > The State Authority, local authority and any public officer or employee of the local authority shall not be subjected to any action, claim, liabilities of demand whatsoever arising out of any building or other works carried out in accordance with the provisions of this Act or any by-laws made thereunder or by reason of the fact that such building works or plans thereof are subject to inspection and approval by the State Authority, or such public authority and nothing in this Act or any by-laws made thereunder shall make it obligatory for the State Authority or the local authority to inspect any building, building works or material or the site of any proposed building to ascertain that the provisions of this Act or any by-laws made thereunder are complied with or that plans, certificates and notices submitted to him are accurate.

**[16]** The plaintiffs did not appeal against that decision.

**[17]** As against the third defendant, the plaintiffs' claim was for unnecessarily allowing infiltration or seepage of water into the ground and/or allowing it to overflow onto the plaintiffs' land causing saturation in the soil resulting in the landslide which brought down the bungalow. The learned judge was of the view that there are four main allegations of fault against the third defendant:

(a) inserting a pipe into the public drain fronting Lot 3009 which caused rainwater to overflow onto Lot 3009, Lot 3008 and Lot 3007;

(b) blocking the public drain fronting Lot 3008 with plastic sheets and wooden debris thereby causing rainwater to overflow onto Lot 3008 and Lot 3007;

(c) excavating a trench measuring 60' x 10' x 3' on Lot 3008, causing it to collect a concentration of rainwater which seeped and infiltrated into the ground;

(d) leaving transverse drains built along the slope of Lot 3008 to end three quarter of the way down the slope instead to the river.

**[18]** In his judgment, the learned judge found that the plaintiffs failed to prove the first two allegations, but succeeded in proving the last two allegations. In his judgment he said:

> The cause of action against the third defendants is based on nuisance, negligence and the rule of *Rylands & Fletcher*. As for liability in respect of water it is best stated in *Clerk & Lindsell on Tort* (13th Ed) at p 851, of which was adopted by the Federal Court in *Seong Fatt Sawmill Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286. It reads as follows:
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> > Liability in respect of water depends on whether the water is naturally on the land or whether it is artificially accumulated or interfered with in some way. The owner of land on a lower level cannot complain of water naturally flowing or percolating to his land from a higher level. Nevertheless the higher proprietor is liable if he deliberately drains his land onto his lower neighbour's land and this appears to be so if the water is caused to flow in a more concentrated form than it naturally would, as the result of artificial alterations in the levels and contours of the higher land.
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> When water appears upon the surface of the land in a diffused state, with no regular course, and then disappears by percolation or evaporation, Justice Winderyer J in an Australian case of *Gartner v Kidman* (1961-62) 108 CLR 12 has this to add:
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> > The higher proprietor: He is not liable merely because surface water flows naturally from his land on to lower land. He may be liable if such water is caused to flow in a more concentrated form than it naturally would. It flows in a more concentrated form than it naturally would if, by the discernible work of man the levels or conformations of land have been altered and as a result the flow of surface water is increased at any particular point. If a more concentrated flow occurs simply as the result of the 'natural' use of his land by the higher proprietor, he is, generally speaking, not liable. What is a natural use is a question to be determined reasonably having regard to all the circumstances, including the purpose for which the land is being used and the manner in which the flow of water was increased, as for example whether it is agricultural land cleared for grazing, whether it is a mining tenement, or is used for buildings and so forth. …

In this case, the third defendants had artificially accumulated the rainwater with the excavation which was an alteration to the nature of the land. They had also interfered with the rainwater by constructing transverse drains ending three quarter way down the slope of Lot 3008. All these had affected the natural flow of the water resulting in its concentrated and increased infiltration into the land thereby causing destructive effect to Lot 3007. By such deeds the third defendants have breached their duty of care towards the plaintiffs in respect of negligence, caused nuisance to the plaintiffs, as well as being liable in part under the rule of *Rylands & Fletcher*

Though the third defendants did claim contributory negligence from the plaintiffs, but from the evidence so tendered this court finds no support for it. The plaintiffs have built a house according to plans advised, drawn and designed by the first and/or fourth defendants. They have even taken cautionary steps to place piles along their slopes and sand bags at the toe of both Lots 3008 and 3007. They had also advised the third defendants to take precautionary measures in their construction on Lot 3008. These were positive actions which cannot be interpreted as having contributed to the third defendants' negligence.

**[19]** Based on the above, the learned judge found that the third defendant was 40% liable for causing nuisance and negligence which contributed to the collapse of the bungalow. Apparently, the third defendant did not appeal against that decision nor did the plaintiffs.

**[20]** The appeal before us is only the appeal by the fourth defendant. Though there is no appeal by the first defendant. It is clear from the evidence that the fourth defendant was the sole proprietor and the alto ego of the first defendant and the decision against the fourth defendant (the appellant) is a decision against the first defendant. It appears that when this matter came up for hearing in the court below, the fourth defendant had been struck off from the Register for committing an offence of running two engineering firms at two different places. We are not sure whether the first defendant is still in existence when this matter came up for hearing before us in view of the fact that the fourth defendant, being the sole proprietor of the first defendant, had been struck off from the Register.

**[21]** In his judgment, the learned trial judge found that the first defendant was an engineering firm solely owned by the fourth defendant (the appellant). In his judgment, the learned judge made it clear that any reference to the first defendant would be reference to the fourth defendant. In his judgment the learned judge said:

The contractual relationship between the plaintiffs and the first defendants, which is basically the fourth defendant derives from a letter of appointment tendered as exhibit P12. In it, the first defendants agree 'as your (the plaintiffs) consultant engineers to prepare the civil and structure drawings and calculations and to submit to the respective authorities'. These drawings and calculations, as the heading in exhibit P12 specifies are for the plaintiffs' house. Other than this brief declaration of obligation and another two short paragraphs which devotes to the amount of professional fees charged and the mode of its payment, no other terms are elaborated.

By the nature of the plaintiffs' claim on contractual liability, the contentions are as follows:

(a) the first and/or fourth defendants failed to exercise reasonable care and skill in carrying out all aspects of the engagement having regard in particular to the primary objective of the plaintiffs;

(b) the first and/or fourth defendants failed to properly and adequately implement and examine Lot 3007, its soil condition and surroundings to ascertain the suitability of the slope for the proposed house to be built thereon.

As these contentions are not within any express and specific condition in the written contract, the only basis the plaintiffs can rely on to succeed is within the legal concept of they being implied terms.

The principle of implied terms to be read into any contract is well accepted in our courts, and for it to be applicable certain conditions must be fulfilled. On these, Lord Simon in the Privy Council case of *BP Refinery (Western-port) Pty Ltd v. Shire of Hasting* (1978) 52 ALJR 20 had spelled them out as follows:

> In their (their Lordships) view, for a term to be implied, the following conditions must be satisfied; it must be reasonable and equitable; it must necessary to give business efficacy to the contract, so that no term will be implied if the is effective without it; it must be so obvious that 'it goes without saying', it must be capable of clear expression, it must not contradict any express term of the contract.

In the circumstances of this case, the contract between the plaintiffs and the first and/or fourth defendants is one of performance of services by professionals who have described themselves as 'consulting Civil and Structural Engineers'. Any persons declaring themselves to be such must reasonably and equitably be expected to take reasonable care and skill in the performance of their craft. If this be not the case, why then should a layman engage and pay a price for their services. This term of the expected reasonable care and skill is so obvious in the first and/or fourth defendants' appointment that this court finds it to come within the ambit of 'it goes without saying'. Further, this term is clear in expression and contradicts no other terms in exhibit P12. For these, it qualifies to be accepted as an implied term of the contract between the plaintiffs and the first and/or fourth defendants.

**[22]** Perusing the memorandum of appeal, the fourth defendant accepted the above ruling by the learned judge. In his memorandum of appeal, the fourth defendant raised 15 grounds which could be simplified into two broad issues, ie the contractual liability and the causation.

**[23]** Before us, the learned counsel conceded that the learned judge was correct in his conclusion in respect of the contractual liability. the fourth defendant contended that the plaintiffs in their statement of claim failed to plead duty of care, particulars of negligence and causation in respect of the collapse. Anyway, the learned counsel for the fourth defendant submitted that the contractual liability could be narrowed to: (i) whether the duty of care had been breached; and (ii) the causation.

**[24]** The learned trial judge in his judgment stated:

> In respect of the soil, he took some samples from the exposed layer on the land in his hand, examined it visually, and concluded it to be a silty sand soil. To him this soil 'has good drainage properties, it drains very fast'.
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> As regards to the house, piling was recommended and carried out just before the slope so that the structure of the house would 'not place too much weight on the slope'.
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> All these evidence of the fourth defendant, considered in the light of the expert opinions of KTA's report and that of Dr Toh's reveal fundamental weaknesses. Firstly, as admitted by this

defendant himself under cross-examination, 'I cannot ascertain the soil by simply looking at it'. By just looking and feeling the soil he agrees that the sheer strength of the soil cannot be determined. Yet, it is an accepted fact by the two expert engineers and to a large extent by the fourth defendant himself, that the determination of this sheer strength of the soil was one of the vital factors in deciding slope stability. Exhaustive tests were conducted by both Dr Ramli and Dr Toh in the laboratory on the nature and strength of the grain found on Lot 3007, but with this professional, the fourth defendant, his judgment depended on only visual and feel. Further, though silty sand soil has good drainage properties but as the fourth defendant also admits, 'water also enter (into such soil) very fast, and water do not drain out immediately. There would be a period when the water will be held in the soil'. If this is his theory then suction in the soil will be saturated, effecting its stress effectiveness to be reduced to a point where the total sheer strength resistance would fail resulting in a landslide. So essential is the need for an engineer to determine the soil condition to a high degree of certainty, particularly on a gradient such as Lot 3007, that a failure to do so must be accepted as a breach of implied term of his appointment to take reasonable care.

**[25]** The fourth defendant submitted that the learned judge was in error in coming to the conclusion that the fourth defendant did not do enough to ensure that the building that he built on Lot 3007 was safe. In his submission, the fourth defendant stated that construction of the bungalow was completed in 1985 and handed over to the plaintiffs on 11 April 1985. It was only on 17 September 1988 that the bungalow collapsed. The fourth defendant submitted further that the house on Lot 3008 which was situated above Lot 3007 (the bungalow) was constructed later. It was also submitted that the bungalow collapsed two weeks after the third defendant (who was the contractor building the house on Lot 3008) did some excavation to construct a trench 60' x 10' x 5'. This trench collected water which caused weakening to the wall and caused the bungalow to collapse. The fourth defendant claimed that stability of 1.53 was enough and that was an accepted engineering fact. The fourth defendant referred to exh P20 (pp 775–878 of the appeal record at pp 775–784) the expert opinion submitted by the fourth defendant.

**[26]** As to causation, the learned counsel for the fourth defendant submitted that there was no finding on causation by the learned judge. In the court below, two separate reports prepared by two experts were tendered as evidence. The first report from the firm KTA prepared by Dr Ramli was tendered by the plaintiffs while the second report prepared by Dr Toh was tendered by the fourth defendant. The two reports are basically evidence in respect of causation of the collapse. In addition, both Dr Ramli and Dr Toh gave evidence in court in support of their reports. The fourth defendant contended that the learned trial judge was in error when he preferred the evidence of Dr Ramli.

**[27]** The learned judge in his judgment explained why he preferred to accept the finding (opinion) of Dr Ramli as against the finding of Dr Toh:

The fourth defendant through the vehicle of the first defendants had professed to be a consultant civil and structural engineer. His specialized craft was to advise and design structures adequate and safe for a particular purpose. Why then did the house collapse, and was it due to the fourth defendant failing to exercise his skill to the standard of a man professing similar professional craft? To examine this, one would have to refer to the reports by the experts. *One is prepared by KTA with Dr Ramli's testimony in court to elaborate on it.*

*The other is a report prepared by Dr Toh on 27 April 1995 — exhibit D20 done almost six years after the collapse of the house, at the request of the first and/or fourth defendants.*

*Basically, in KTA's report, the collapse of the house was attributed to slope failure caused by the lateral movement of the earth supporting the foundation of the house. This was due to infiltration of water, such as rainfall which increased saturation of the soil causing a rise in water table and a reduction in the soil suction. 'This result in a decrease in the effective stress and therefore soil sheer strength, to a point where the total sheer resistance along the potential failure surface is insufficient to sustain equilibrium of the slope'. In KTA's opinion, though 'it is extremely difficult to predict the relationship between suction and rainfall intensity for a particular soil profile, a conservative analysis could be made by assuming sheer strength parameters for saturated soil. This, coupled with a reasonable assumption of piezometric heads within the slope, would give a conservative indication of the factor of safety against failure of the slope.* Such an analysis, based on sheer strength and other data as shown in Drg RBM-FR-89-2, gives a safety of about 1, indicating that the slope was of doubtful stability'.

*Dr Toh, though questioned the high water table grafted in KTA's report is basically in agreement with the theory of the movement of soil. The main difference between his own and that of KTA's is that he attributes the failure of the slope not so much on the high water table but more on the toe failure of the slope near to the river which substantially supported the original slope.*

Now lets examine what the fourth defendant said and did. According to him, 'dealing with soil is like taking our daily meal'. Firstly, he had a visual inspection. From this he said, 'one will be able to determine whether there is a need to machine bore to obtain the subsoil. When boring is necessary, the extracted soil will be sent to the laboratory for test'. For Lot 3007 however, no subsoil was extracted for laboratory examination. Instead, the fourth defendant just had a visual examination of the slope and came to a conclusion that the slope, being a cut slope as compared with a filled slope, extraction by machine bore to obtain the subsoil was not necessary. He also observed that the slope was well done with a safe gradient. Though he did notice the river at the bottom of Lot 3007, he felt that it was a distance away from where the house was to be erected. He also added that, 'I did not worry about the river because there was drainage contribution by the original developer under usual state authority requirement and this is for the maintenance of the river by channeling it. I took it for granted that the government will channel it'.

In respect of the soil, he took some samples from the exposed layer on the land in his hand, examined it visually, and concluded it to be a silty sand soil. To him this soil 'has good drainage properties; it drains very fast'.

As regards to the house, piling was recommended and carried out just before the slope so that the structure of the house would 'not place too much weight on the slope'.

*All these evidence of the fourth defendant, considered in the light of the expert opinions of KTA's report and that of Dr Toh's reveal fundamental weaknesses.* Firstly, as admitted by this defendant himself under cross-examination, 'I cannot ascertain the soil by simply looking at it'. By just looking and feeling the soil he agrees that the sheer strength of the soil cannot be determined. Yet it is an accepted fact by the two expert engineers and to a large extent by the fourth defendant himself, that the determination of this sheer strength of the soil was one of the vital factors in deciding slope stability. *Exhaustive tests were conducted by both Dr Ramli and Dr Toh in the laboratory on the nature and strength of the grain found on Lot 3007, but with this professional, the fourth defendant,* his judgment depended on only visual and feel. Further, though silty sand soil has good drainage properties but as the fourth defendant also admits, 'water also enter (into such soil) very fast, and water do not drain out immediately. There would be a period when the water will be held in the soil'. If this is his theory then suction in the soil will be saturated, effecting its stress effectiveness to be reduced to a point where the total sheer strength resistance would fail resulting in a landslide.

*So essential is the need for an engineer to determine the soil condition to a high degree of certainty, particularly on a gradient such as Lot 3007, that a failure to do so must be accepted as a breach of implied term of his appointment to take reasonable care.*

*The level of the existence of the water table on the said land before the landslide is a hotly debated issue between Dr Ramli and Dr Toh. Both their assumptions on where this water table was, is based on facts after the slope had failed. Nevertheless, despite this differences of opinion, both agree that it plays an important part in the determination of slope stability. If the water table is high, then the slope is more vulnerable.* This is only elementary and yet, according to the fourth defendant, a qualified engineer he felt that, 'at the time I (he) looked at the site and drew my plans, I (he) did not make an assumption of where the water table was'. This certainly is a clear breach of professional duties.

The presence of the river cannot be ignored. Though it may provide scenic beauty to the owner of the land above but its potential of threat to the land was, but apparent. This, the court had the opportunity of observing this during a visit to the site. the fourth defendant had also made similar observation and conclusion where, besides what he uttered earlier adds, 'I cannot say the river pose absolutely no danger but I assumed that the general development would have taken into consideration the river'. This assumption together with his belief that since the owner pays drainage contribution, the government will channel the river are mere presumptions, taken for granted by him, and not substantiated or investigated as a professional in this field would have done. As a qualified engineer on civil and structural matters, with a slope as steep as that found in Lot 3007 coupled with a river of swift flowing water, the fourth defendant should have taken serious and in depth consideration of its presence when recommending, planning and finally building a house above. Presumptions have no place in this trade particularly when structures to be erected thereon must be able to withstand and accommodate natural and existing forces. Though financial costs can overcome any slope instability in a situation such as this, but at the very least the same should be made known to the owner. In this case this was not even presented.

Faced with a sharp gradient as that in Lot 3007, and a river at its bottom little care and attention seemed to have been concentrated on the slope which practically engulfed two thirds of land in Lot 3007. In the opinion of this court, an engineer of such qualification and skill as the fourth defendant should have taken these matters into more serious consideration to design and devise plans that would have made the house erected thereon safe for habitation. Instead, a casual attitude was adopted without much care and skill practiced. Such work is indeed a far cry from that expected of a professional in a similar field. *As KTA's report prepared also by a firm of consulting engineers has remarked at page 10, 'it is evident that no systematic attempt to assess the stability of the slope based on established engineering techniques' were adopted. Again this seems to be the view of Dr Toh, a qualified engineer by his first degree and the first and/or fourth defendants own witness when he opinioned that 'The engineers should have taken a duty on all these factors, ie water table level plus wetting area before building a house on such a terrain'*. Under these circumstances, this court hereby finds the first and/or fourth defendants liable to the plaintiffs for breach of contract.

(Emphasis added.)

**[28]** Perusing the two reports, it is clear to us that the learned trial judge had come to the right conclusion. We are of the view that the learned judge took great pains to study the two reports. The learned judge found the views expressed by Dr Ramli and Dr Toh to be almost similar except for the collapse. In his evidence, Dr Ramli stated that the cause was due to water saturation on Lot 3007 while Dr Toh stated the cause was due to the slope near the river. The reason given by the learned judge in preferring the view of Dr Ramli was the fact that Dr Ramli carried out the

investigation soon after the collapse when the instability of the ground could still be seen. Dr Toh, on the other hand, carried out his investigation six years after the collapse which, in our view, the ground had stabilised and the water saturation on Lot 3008 caused by the trench might not be there anymore and whatever water on Lot 3007 could by then have been drained out. In our view, the learned judge is justified in taking up that view.

**[29]** In the passage we cited above (in particular the last paragraph), the learned judge found the fourth defendant was liable on the ground that the fourth defendant, as an engineer, should have taken more serious considerations of the ground and its vicinity in designing and devising plans that would make a house erected on Lot 3007 safe for habitation. In this the evidence of both Dr Ramli and Dr Toh complement each other in that the fourth defendant failed to do a thorough test of the soil and ground on Lot 3007. The fourth defendant only did visionary and feeling tests which the learned judge found not acceptable.

**[30]** The fourth defendant contended that the trial judge was in error when he accepted the evidence of Dr Ramli and rejected the evidence of Dr Toh. After reading the judgment of the learned judge, we find that this is not true. The learned judge did consider the evidence of both but at the end preferred the evidence of Dr Ramli on the ground that the investigation carried out by Dr Ramli was closer to the time when the incident took place. Further, the evidence of Dr Ramli was supported by the fourth defendant himself when he admitted that he did not do a thorough testing of the soil where the bungalow was built. This is negligence on the part of the fourth defendant. There is no fault on the part of the learned trial judge.

**[31]** The learned judge also found that the third defendant was also partly to be blamed when he constructed a trench near the boundary of Lot 3007. The trench retained and collected water. The water collected saturated the ground mostly on Lot 3007. This was a contributory factor to the collapse. For that the learned judge found the third defendant to be 40% liable. The fourth defendant was apportioned 60% liability on his failure to exercise his skill and duty as an engineer and consultant in constructing the bungalow.

**[32]** The fourth defendant's only other ground of appeal is found in paragraph 4 of the memorandum of appeal where it is stated that the learned judge had erred in giving judgment on 'pure economic loss' based on tortious liability. In his judgment the learned judge stated as follows:

> This court shall now move on to consider the plaintiffs' claim for negligence. Basically they allege that the first and/or fourth defendants have breached a duty of care in failing to take into serious consideration the stability of the slope on which the house was built. Against this, Mr. Ngeow, counsel for both these defendants immediately maintains that this claim is for pure economic loss, the collapsed house being the defective product. With this defence, this court is forced to move into an arena of fierce legal embattlement now being raged throughout the entire Common Law practicing nations, and to take a legal stand.
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> To understand this 'loaded' term of pure economic loss or economic loss one has to move backwards in time, to the creation of the principles of negligence in the case of *Donoghue v Stevenson* [1932] AC 562. There Lord Atkin expounded the principle of where there is a

duty to exercise care, reasonable care must be taken to avoid acts or omissions which can reasonably foreseen to be likely to cause physical injury to person or damage to his property other than the damaged property itself. By this proposition, a person without contractual relationship can claim from another damages for injury suffered by him or damage to his property, other than the defective product itself. Any claim to this defective product either in the manner of making good or replacement thereto, is a claim for pure economic loss. This can be better explained in the context of the facts in *Donoghue v Stevenson* itself. There the consumer of a bottle of ginger beer which contained the dead snail was successful in her claim against the manufacturer of negligence for injuries to her health and damage to her property (if any) other than the contaminated bottle of ginger beer, it being the defective product.

This principle has been applied to different but analogous factual situation for a substantial period of time since first established, but often the last condition of this proposition was not seriously considered in respect of defective houses until the case of *Dutton v Bognor Regis Urban Council* [1972] 1 QB 373. In this case, the plaintiff was the second purchaser of a house and soon after she moved in found serious defects in the internal structure of the building. Investigation revealed that this was caused by inadequate foundation due to the fact that it was constructed on the site of a rubbish tip. She sued the local council whose building inspector was negligent in failing to detect the defect at an early stage of the building works. The only issue before the Court of Appeal in consequent to an award of damages to the plaintiff by the Court of first instance for the estimated cost of repairs of the house and the surveyor fees was, whether the council was liable to the plaintiff for pure economic loss. Pure economic loss being the claim on the defective product, ie the defective house itself. The Court of Appeal dismissed the appeal and found in favour of the plaintiff. By this, it means a departure from the principle that defective product itself cannot be claimed. This gives rise to a case of recovery of economic loss which was not consequent on any injury to person or damage to property.

*Dutton*'s case was approved by the House of Lords in *Anns & Ors v London Borough Council of Merton* [1978] AC 728. Here again the plaintiff who took a long lease in a block of flats found cracks in the wall. The cause was due to inadequate foundation. The builder was sued and so was the local council. The latter for allowing the builder to construct the building on inadequate foundation or in failing to carry out necessary inspection or approving the foundation. The House of Lords held that the council owed a Common Law duty of care to the plaintiffs. This again is a claim based on the defective product itself and thus pure economic loss can be recovered.

Though the above two authorities involve the liability of the local council, the House of Lords in *Junior Books Ltd v Veither Co Ltd* [1983] 1 AC 520 dealt directly with the builder's liability to the owner of the building with whom he had no contractual relationship with. They too were found liable for negligence on a claim for economic loss.

In 1989, this legal proposition in motherland of Common Law took a drastic change, and retreated from the broad view they took earlier. In the case of *D & F Estates Ltd & Ors v Church Commissioners for England & Ors* [1989] AC 177, the House of Lords dismissed the Court of Appeal decision basically on the following grounds:

(1) any duty owed by a contractor to a home owner with respect of quality of the construction must arise in contract and not tort;

(2) that to allow the recoverability for the cost of repairing defects in the building would have the effect of creating a non-contractual warranty of fitness;

(3) the contractor can only be held liable in tort to subsequent purchaser on negligence which caused physical injury or damaged to other property other than the damaged property.

Once again the facts in this case are virtually similar to the cases referred to earlier. The defendants were main contractors hired by the owner to build a block of flats. A sub-contractor was engaged by the main contractor to carry out plastering work which they performed negligently. The plaintiff, a lessee to a flat in this block discovered that the plaster on the ceiling and wall were loose. He repaired it and sued the original contractor for the cost of repairs and estimated cost of future remedial works.

The decision of *D & F Estates Ltd* was fortified by the latest case of *Murphy v Brentwood District Council* [1990] 2 All ER 908, in which the House of Lords expressly departed from *Anns*. Here the defendant's council approved the design on the foundation of a house which was found by a subsequent purchaser to be defective. The highest court of appeal in the United Kingdom ruled that the defendant's counsel owed no duty of care to the plaintiff in respect of the damage of the kind sustained. The reasons, as Lord Keith put:

> To start with, if such a duty (of care) is incumbent on the local authority a similar duty must necessarily be incumbent also on the builder of the house. If the builder is so subject, there can be no grounds in logic or in principle for not extending liability on like grounds to the manufacturer of the chattel. That would open on an exceedingly wide field of claims, involving the introduction or something in the nature of a transmissible warranty of quality. The purchaser of the article who discovered that it suffered from a dangerous defect before that defect had caused any damage would be entitled to recover from the manufacturer the cost of rectifying the defect, and, presumably, if the article was not capable of economic repair, the amount of loss sustained through discarding it. Then it would be opened to question whether there should be a right to recovery where the defect renders the article not dangerous but merely useless. The economic loss in either case would be the same. There would also be a problem where the defect causes the destruction of the article itself, without causing any personal injury or damage to other property. A similar problem could arise, if the *Anns* principle is to be treated as confined to real property, where the building collapse when unoccupied.

In another part of his judgment, Lord Keith proceeded with:

> so far as policy consideration is concerned it is no doubt the case that extending the scope of the tort of negligence may tend to inhibit carelessness and improve standard of manufacturer and construction on the other hand, overkill may present its own disadvantages.

Unfortunately these sentiments do not seem to be shared by the Commonwealth counter-parts. Starting with New Zealand, the case of *Invercargill City Council v Hamlin* [1996] 1 All ER 756 refused to follow Murphy. Ironically this is an appeal heard before the Privy Council which affirmed the decision of the New Zealand Court of Appeal for upholding the trial judge's finding that the City Council were liable for negligence to the plaintiff based on the following facts. The plaintiff contracted a builder who sold him the land to construct a house thereon. In the course of construction a building inspector from the City Council inspected and approved the work as in accordance with the Council's by-laws. Years later cracks appeared in the house leading to this plaintiff's claim against the City Council. The reasons forwarded by the Privy Council for not adopting *D & F Estates Ltd* and *Murphy* appear to be:

(a) New Zealand Court of Appeal is entitled to develop the Common Law of New Zealand according to local policy consideration in areas of Common Law which are developing;

(b) And the perception in New Zealand is that the community standards and expectation demanded the imposition of a duty of care on local authorities and builders alike to ensure compliance of by-laws, and the Court of Appeal of New Zealand has built up

> a long line of authority based on link concept of control by the local authority of building works through the enforcement of its by-laws, and reliance on that control by the purchaser.

Next comes Canada in *Winnipeg Condominium Corp No 36 v Bird Construction Co Ltd & Ors* (1995) 121 DLR (4th Ed.) 193. Here a developer entered into a contract with a general contractor called Bird Construction Ltd (Bird) to construct an apartment block. Works were carried out according to plans drawn by the architects — Smith Carter. As for the external cladding, it consisted of slabs of stones which were installed by a sub-contractor. The plaintiff becoming the subsequent owner of the apartment had to repair a section of the cladding which fell. He claimed from Bird, Smith Carter and the sub-contractor cost of repairs due to their negligence. Bird applied to strike the plaintiff's claim disclosing no reasonable cause of action. The Court of first instance disallowed this application which was upheld by the Canadian Supreme Court. La Forest J delivering the judgment of the Supreme Court is of the following views:

> The underlying rationale for this conclusion is that the person who participates in the construction of a large house and permanent structure which, if negligently constructed, has the capacity to cause serious damage to other persons and property in the community, should be held to a reasonable standard of care.

He then continues:

> This is important because, in my view, the unfortunate result of the reasoning in *D & F Estates* is that it leaves its subsequent purchaser with no remedy against the contractor who construct the building with substandard materials and substandard workmanship and thereby puts subsequent purchasers at considerable risk.

Australia, initially in the case of *Sutherland Shire Council v Heyman & Anor* (1984–1985) 157 CLR 424 found that the Council was not guilty of negligence for approving plans which subsequently showed inadequate footings. However in their latest landmark decision in *Bryan v Maloney* (1995) 128 ALR 163, the High Court of Australia by a majority supported the trial judge's ruling that the Council was liable for negligence to a subsequent owner of the property who was put to loss by the defective house. In their judgment, the High Court of Australia has this to say:

> The relationship between them (the subsequent purchaser and the builder) is marked by proximity in a number of important respects. The connecting link of the house is itself a substantial one. It is a permanent structure to be used indefinitely and, in this country, is likely to represent one of the most significant, and possibly the most significant, investment which the subsequent owner will make during his or her lifetime. It is obviously foreseeable by such a builder that the negligent construction of the house with inadequate footings is likely to cause economic loss, of the kind substantiated by Mrs Maloney, to the owner of the house at the time when inadequacy of the footing first become manifest.

Closer home in Singapore, this similar type of issue appeared in the case of *RSD Architects Planners & Engineers v Ocean Front Pte Ltd* (1996) 1 SLR 113. LP Thean, judge of the Court of Appeal practically combed the entire Common Law countries for enlightenment as to whether the plaintiff, a management corporation of a condominium can sue the developers and the architects for pure economic loss arising out of faulty construction of the common property in the building. Ultimately, the Court of Appeal of Singapore elected not to follow *Murphy and D & F Estates* and found that the builders and architects can be liable for negligence.

At home two High Court decisions are made on this subject. The first is the case of *Kerajaan Malaysia lwn Cheah Foong Chiew dan lain-lai* [1993] 2 MLJ 439, Wan Mohamed J presided as follows (at pp 447I–448B):

> Kerugian yang dialami oleh plaintif adalah kerugian atau kehilangan ekonomi tulen (pure economic losses), dan defendan ketiga tidak boleh dikenakan tanggungan (liability) di bawah tort di atas kerugian yang dialami oleh plaintif dalam kes ini oleh kerana tiada siapapun yang cedera atau tidak harta kepunyaan orang lain rosak akibat daripada perbuatan atau salahlaku oleh defendan ketiga. Keputusan yang dibuat oleh Dewan Pertuanan (House of Lords) dalam kes *Murphy v Brentwood DC* dan lain-lain kes lagi yang membuat keputusan yang sama, adalah sangat munasabah, berpatutan dan sepatutnya diterima sehingga bila-bila masa pun.

Justice Peh Swee Chin FCJ sitting as a High Court judge in a more recent case of *Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors* [1995] 2 MLJ 663 had the opportunity to confront this issue. He adopted the decisions in *Murphy* and *D & F Estates*. Though not directly stating the reason for his preference, this court is of the view that it was founded in the fear of extending the scope of liability 'for an indeterminate amount for an indeterminate time to an indeterminate class'. It is rather unfortunate that we are deprived of Justice Peh's further elaboration and in depth reasonings for which he is highly acclaimed, particularly when 'there are many cases which are not mentioned in the judgment and which allowed for recovery of pure economic loss in an action for tort', but he felt that 'this is neither the place nor the time to discuss all of them'.

In *Teh Khem On* the purchasers purchased a house from the vendor/builder. After taking possession they found cracks on the wall, the ground was uneven and the upstairs bathroom was leaking. This was repaired by the vendor/builder but subsequent defects appeared. This lead to a series of claims and counter-claims between the purchasers, the vendor/builder and the architects and engineers who were involved in the design and drawing of the said house. The architects and engineers contended that the purchasers' claim being for pure economic loss is not recoverable in negligence. To this Justice Peh agreed when he said:

> The decision of *D & F Estates* in the House of Lords, in so far as it concerns the non-recoverability of such pure economic loss as described above by an owner of the house against the builder in tort i.e. by way of negligence: was confirmed twice by the House of Lords in *Murphy v Brentwood District Council* and *Department of Environment v Thomas Bates & Sons Ltd* [1990] 1 All ER 943.

In the light of the substantial persuasive authorities on this conflicting claims and without any determination from our appellate courts, this court is impelled upon to decide whether to allow a claim for pure economic loss or to reject the same. For this, it is essential to unearth from the cited authorities the rational the courts expounded in arriving at their decisions.

For those against allowing the claim for pure economic loss, it is primarily to avoid the creation of liability 'for an indeterminate amount for an indeterminate time to an indeterminate class', to quote Cardozo CJ in the American case of *Utramares v Trouche* (1931) 255 NY 170, otherwise it would 'open an exceedingly wide field of claims' or creating 'endless indeterminate liability' or 'the overkill may present its own disadvantage.' On the opposing camp in favour one has, 'community's expectation and demand' of third parties to exercise due care and compliance with relevant by-laws, or the deprivation of relief would not justify the economic loss suffered on the defective product, or the moral duty of third party to exercise care.

Of all the reasons against allowing pure economic loss, the fundamental rational is still to prevent the creation or extension of liability to 'an indeterminate amount for an

indeterminate time to an indeterminate class.' But these could be a misconception and unallied fear. Interpreting through the circumstances of all the cases cited, the amount of damages so claimed is not an indeterminate amount. They are the expenses and costs involved in repairing, making good or replacing the defective product, or cost that may be involved in ensuring the defective product is of the condition that it should be in the first place. As for indeterminate time, it may be true that liability to a subsequent owner might be greater than the first owner but as the High Court in Australia in *Bryan v Maloney* states, it can 'limited by the element of reasonableness both in the requirement that the damage be foreseeable and in the content of the duty of care.' In respect of indeterminate class, this court feels that it is best put in the High Court Justices *Bryan v Maloney* as follows:

> The similarities between the relationship between the builder and the first owner and the relationship between builder and subsequent owner as regards the particular kind of economic loss are of much greater significances than the differences to which attention has been drawn, namely the absence of direct contact or dealing and the possibly extended time in which liability might arise. Both relationships are characterised, to a comparable extent by the assumption of responsibility on the part of the builder and likely reliance on the part of the owner. No distinction can be drawn between the two relationship in so far as the foreseeability of a particular kind of economic loss is concerned: it is obviously foreseeable that loss will be sustained by whichever of the first or subsequent owners happens to be the owner at the time when the inadequacy of the footing becomes manifest.'

With these arguments forwarded, one wonders why there is such limitation imposed upon a claim for pure economic loss, for after all the entire concept of negligence is to extend liability beyond the borders of privity. To impose such a restriction is highly inequitable particularly in cases where the duty of care and the breach of such duty are found to be substantiated. There should be no fear that carelessness will be inhibited and the standard of manufacturing and construction section will be improved by the abolition of this so call limitation to a claim for pure economic loss, for after all, it is not this value that society from one generation to the next strive to achieve. To adhere to old principle and leaving it to Parliament to resolve the issue is by no means a solution, since the principle of negligence itself is founded on Common Law, and it is Common Law of the United Kingdom that has a change of heart. Possibly this could be a policy decision in that country as can be reflected in Lord Keith's judgment in *Murphy* when he said:

> *Anns* has the effect of imposing on the builders generally a liability going far beyond that which Parliament thought fit to impose on house builders alone by the Defective Premises Act 1972, a statute very material to the policy of the decision but adverted to in it.

In Malaysia we do not possess this piece of legislation. To adopt the decisions of *Murphy* and *D & F Estates* which are based on a foreign policy of no application here would leave the entire group of subsequent purchasers in this country without relief against errant builders, architects, engineers and related personnel who are found to have erred. If there is any fear that this approach may encumbered upon the local authorities to pay out substantial claims due to their negligence in granting approvals or inspecting building works, there is s 95 of the Street Drainage and Building Act which prohibits such authorities to be sued.

This legal principle for accepting a claim for economic loss is obviously not only confined to defective buildings and structures. It has far greater impact on all situations by analogy and if limited by the limitations imposed as in *Murphy* and *D & F Estates* it would be grossly inequitable with justice not being served. For these reasons, it is the opinion of this court that a claim for pure economic loss can be entertained in a claim in negligence.

Now that this court has found a claim for pure economic loss can be entertained, we shall return to the circumstances of our case. The legal principles to be applied in this claim of negligence against the first and/or fourth defendants must certainly be that of *Bolam v Friern Hospital Management Committee* since this is a claim based on professional negligence. As this principle is similar to that as found under the cause of action for breach of contract which has been elaborated earlier, and since the facts are also identical there is no necessity for this court to re-examine on them. Based on similar grounds as those stated earlier under the cause of action for breach of contract this court hereby finds the first and/or fourth defendants liable to the plaintiffs for negligence.

**[33]** The learned trial judge chose to depart from the High Court decisions which were cited earlier. He was of the opinion that the decisions of *Murphy* and *D & F Estates* which were followed by the two High Court decisions were outdated in view of the decisions of the courts within the Commonwealth except England where the decisions of *Murphy* and *D & F Estates* are still binding.

**[34]** The learned counsel for the fourth defendant submitted that the learned judge was in error when he did not follow the decisions in *Kerajaan Malaysia lwn Cheah Foong Chiew dan lain-lain* [1993] 2 MLJ 439 and *Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors* [1995] 2 MLJ 663, the decisions of emminent judges of this country. It is obvious that the decisions in those cases followed the House of Lords' decision in *Murphy v Brentwood District Council* [1990] 2 All ER 908. In the present appeal, the learned trial judge was fully aware of the decisions in the two Malaysian cases. This can be seen from his judgment where he had referred to the two cases. As can be seen, the judgments were the judgments of two High Court judges. The learned trial judge in the present appeal was also a High Court judge (as he then was) and as such he was not bound by the decisions of those two cases. As such, we find no merit in the submission of the fouth defendant's counsel that the learned judge did not follow the other two decisions of the Malaysian High Courts.

**[35]** In our view, the learned judge was within his right to award damages on pure economic loss. We have been too long in the shadow of the House of Lords' decisions of *Murphy* and *D & F Estates*. We are of the view that it is time for us to move out of that shadow and move along with other Commonwealth countries where damages could be awarded on pure economic loss. In the media, we have seen how consumers suffer due to shoddy and haphazard manner the developers and contractors in putting up buildings with so many defects and in most cases, delay. The legislature and the government are fully aware of this and for those reasons a special tribunal has been set up to cater for complaints in respect of houses. As such, the courts should also play their part in this.

**[36]** Anyway, in the present appeal, we are of the view that the losses by the plaintiffs were not pure economic losses. The evidence shows that the damages suffered by the plaintiffs were the loss of the bungalow which collapsed a few years after it was built on that site where the first defendant failed to conduct thorough tests on the site, whether it was safe to build a building as designed by the first defendant on that site. It was the duty of the first defendant as consultant employed by the plaintiffs to ensure that it was safe to build the building on that site.

The evidence shows that the first defendant failed to carry a thorough test of the soil when they recommended the building to be built on the said land to the plaintiffs. For the said reasons, we are of the view that the learned judge came to the correct conclusion that the first defendant was also negligent and liable.

**[37]** For the above reasons, we find that there is no merit in the appeal and the appeal is hereby dismissed with costs. The order of the learned judge is hereby affirmed. The deposit is to be paid to the account of taxed costs.

**[38]** My learned brother, Abdul Kadir Sulaiman JCA has seen this judgment in the draft and has expressed his agreement.

*Appeal dismissed with costs.*

Reported by John Paul Simon